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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 488

IN RE PETITION OF

LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS

and

PETER W. WEBER,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Adams Press Corp. 110

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IN THE

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PETER W. WEBER,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Local Union 825, International Union of Operating Engineers and Peter W. Weber pray that a Writ of Certiorari issue to review the judgment of conviction entered by the United States Court of Appeals for the Third Circuit in the above entitled case on June 17, 1964.

Judgment of Conviction Below

The judgment of conviction and sentence entered by the Court of Appeals for the Third Circuit is set forth at p. 19 herein.

Jurisdiction

The judgment of conviction of the Court of Appeals for the Third Circuit sitting as a Trial Court was entered on June 17, 1964 and sentence was imposed on June 18, 1964. A timely petition for a new trial was filed on June 18, 1964 and was denied on July 16, 1964. An extension of the time in which to petition for a Writ of Certiorari was filed on August 11, 1964, and was granted on August 12, 1964. The jurisdiction of this court is invoked under 28 *U.S.C.* 1254 (2) since this Court may review any judgment rendered in a United States Court of Appeals.

How Federal Question is Presented

A Certificate of the Court of Appeals for the Third Circuit made a part of the record of the case establishes that the Federal Questions in issue were relied upon by the Petitioners in that Court, that the Federal Questions were material to the determination of the case there, and that Federal Questions were determined adversely to the petitioners.

Questions Presented

1. Whether a Judgment of Conviction of criminal contempt rendered by a United States Court of Appeals is subject to appellate review.

2. Whether a United States Court of Appeals has the jurisdiction to hear and determine a criminal contempt matter.

3. Whether a United States Court of Appeals has the jurisdiction to sit as a trial court of original jurisdiction.

4. Whether the constitutional right to trial by jury should have been afforded petitioners.

5. Whether the petitioner Peter W. Weber was properly included as a party defendant in this matter.

Statement of the Case

Petitioners (Local 825 and Weber) pray that a Writ of Certiorari issue to review the judgment of conviction and sentence made and entered by the United States Court of Appeals for the Third Circuit in the action entitled: In Re Local Union 825, International Union of Operating Engineers, AFL-CIO and Peter W. Weber.

On March 30, 1964, there was filed with the Court of Appeals for the Third Circuit by the National Labor Relations Board by its Assistant General Counsel a "Request for institution of adjudication in and punishment for criminal contempt." On April 8, 1964, the Court of Appeals for the Third Circuit entered an "Order of Notice" wherein Local 825 and Weber were ordered to appear before that Court on May 4, 1964, to show cause why there should not be such judgment in and punishment for criminal contempt. On an adjourned date, June 17, 1964, testimony was taken in the matter and on such date the Court found the defendant Local 825 and the defendant Peter W. Weber guilty of criminal contempt of Court as charged. On June 18, 1964, sentence was imposed and the defendant Local 825 was fined in the amount of $15,000.00 and the defendant Peter W. Weber was fined $5,000.00 (Tr. 146).

On June 18, 1964, a Notice of Motion for a new trial was filed on behalf of both defendants together with a Notice of Motion pursuant to Rule 23 of the Federal Rules

of Criminal Procedure requesting that the Court make specific findings of fact. A motion was also made wherein the defendants requested that the three judges sitting as a panel be polled to determine whether each judge found each defendant guilty of criminal contempt beyond a reasonable doubt. The motion for a new trial was denied on July 16, 1964. The Court of Appeals entered findings of fact and conclusion of law on the same date. See Appendix (p. 22, herein). This petition follows.

Reasons Why the Writ Should be Granted

A. Petitioners find themselves in the incongruous position of being adjudged guilty o the criminal offense of contempt of the order and decree of the United States Court of Appeals for the Third Circuit apparently without a right of review of the validity of the aforesaid conviction.

While a contempt of a criminal nature once adjudged may be reviewed by an appellate court in all other circumstances, it would appear from a study of the applicable Federal Rules of Procedure, both civil and criminal, that no such right inheres where the original trial court be a Federal Circuit Court of Appeals.

In the light of the recent, far-reaching developments in the law expounded by this Honorable Court in the field of due process as it relates to criminal law and procedure this present predicament in which your petitioners find themselves would appear to be at the least quite contradictory. Your petitioners, through this mode of process respectfully attempt to attain a two-fold goal. First, we earnestly request the opportunity to fully brief and argue the inherent fundamental unfairness in not having available a mode of review as of right in a situation such as is now presented. Secondly, failing a convincing showing

to the first issue, above, we respectfully pray that this Writ be granted so that by this vehicle the substantial allegations of error which we assert may be considered and decided. Without the granting of the relief now requested it would be indeed difficult to perceive how the spirit and purpose of the due process clause of the U. S. Constitution can be fully respected.

Recent judicial language appears to espouse the right of a defendant to appeal a criminal conviction as a part of due process of law. *Brown* v. *Looney*, 249 F. 2d 61 (10 Cir. 1957); *Rayne* v. *Warden*, 198 F. Supp. 552 (D. C. My. 1961). As this appears in conflict with prior judicial opinion, *McKane* v. *Durston*, 153 U. S. 684 (1891), it is evident that a substantial federal question ripe for determination by this Court is presented.

B. The Court of Appeals lacked jurisdiction to try petitioners for criminal contempt.

The Supreme Court of the United States has never ruled on the question as to the jurisdictional right of a United States Court of Appeals to sit as a trial court in a criminal contempt matter.

The United States Supreme Court has held that a person or a party accused of criminal contempt of a United States Court of Appeals has no right guaranteed by the Constitution or by Federal Statute to a trial by jury, *U. S.* v. *Barnett*, 376 U. S. 681 (1964). Mr. Justice CLARK in delivering the opinion of the Court commented:

> "While this Court denied the petition for Writ of Certiorari to review that order, *Mississippi* v. *Meredith*, 372 U. S. 916 (1963), and while the issue is not before us now, the Court would not be foreclosed from passing on the *jurisdictional* question if and when it is properly presented here after the trial on the merits." (Emphasis ours.)

In interpreting the meaning of the above cited quote, it would seem that the Court could pass upon the jurisdiction of a Court of Appeals to sit as a trial Court not only in the case cited but also in a case where this same question has been properly raised. The case at hand is such a situation.

Mr. Justice BLACK, in his dissenting opinion in *Barnett, supra*, at p. 724 said:

> "In the first place, Congress has never expressly given the Federal Courts of Appeals jurisdiction to try and punish people for criminal contempt of Court, and I am unwilling to hold that such power exists in these courts in the absence of a clear and unequivocal Congressional grant. The business of trial courts is to try cases. That of appellate courts is to review the records of cases coming from the trial courts below. In my judgment it is bad for appellate courts to be compelled to interrupt and delay their pressing appellate duties in order to hear and adjudicate cases which trial courts have been specially created to handle as a part of their daily work. And in particular, I believe that it is highly disruptive and downright injurious to appellate courts for them to attempt to take over and try criminal contempt cases, surcharged as these cases almost always are with highly emotional quarrels. (Citation). Appellate courts are too useful a part of our judicial system to be subjected to such unnecessary ordeals. I say unnecesessary because trial courts are as qualified and capable to try contempt cases as they are to try others."

In the body of the Federal Constitution there are certain situations enunciated in which the United States Supreme Court, and that courts only, has jurisdiction to try

and adjudicate a matter. Whenever such a matter has been presented for adjudication to the United States Supreme Court, it has never either *en banc*, or by a single justice taken the evidence as a trial court would. In such situations, the Supreme Court has always appointed a special master or commissioner acting for the Court to take the evidence and to make findings of fact and of law which then would be presented to the Supreme Court for final adjudication. In this way, the Supreme Court has always acted as an Appellate Court even though it has original jurisdiction over some matters. It is, therefore, contended that a United States Court of Appeals should act in the same manner or refer the matter to the proper United States District Court.

The judicial systems of the United States both Federal and State were established to try controversies between those who have committed unlawful offenses against others.

It would be repugnant to our notion of a fair and impartial judicial system to allow stand, in the circumstances here presented, a procedure wherein the person or body against whom an alleged offense has been committed is allowed to serve as the judge and jury on the question of guilt or innocence. See *Barnett, supra*, p. 762 (dissent of BLACK, J.).

C. Constitutional due process demands that petitioners in the instant case be afforded the right to trial by jury.

While at first blush it would appear that this Court's recent holding in *United States* v. *Barnett, supra*, precludes the argument herein made we respectfully urge that it does not. Moreover, the state of the instant case, being a final adjudication of guilt and punishment presents squarely the issue whether, especially in the light of the

degree of punishment meted out, the constitutional rights of petitioner have been abridged.

Here, the Court went beyond the so-called penalty for a petty offense. We contend this to be sufficient reason for separate consideration of the instant matter especially in view of prior language of this Court. *District of Columbia v. Clawans*, 300 U. S. 617 (1937).

The dissenting opinions of Justices BLACK and GOLDBERG in *Barnett, supra*, are replete with the historical background of the offense of criminal contempt. This background, we submit, amply justifies the relief here requested, *i.e.* a new and full reconsideration of the constitutional question posed.

D. Petitioner Peter W. Weber was improperly charged as a defendant in the "Request for Adjudication of Criminal Contempt."

No legal basis whatever has been shown for the inclusion of petitioner Weber as party defendant in the criminal contempt proceeding. The Order which Local 825 allegedly did not respect was directed to the Local and not to petitioner Weber. It is only by virtue of the action of the National Labor Relations Board that Weber became subject to criminal action. We assert that proper procedure called only for the citation of Local 825 in the "Request" and not for the inclusion of any named individual. The attempt to justify the inclusion of Weber rested on a weak ground indeed: Though the matter tried was of criminal nature much hearsay testimony was admitted and exhibits were improperly received in evidence. All of these factors point up the urgent need for appellate review and substantiate the petitioners prayer that the Writ be granted.

CONCLUSION

For all of the foregoing reasons petitioners respectfully urge that this petition for a Writ of Certiorari be granted.

Respectfully submitted,

THOMAS E. DURKIN, JR.,
Attorney for Petitioners, Local 825 and Peter W. Weber.

[APPENDICES FOLLOW]

APPENDIX A

Request for Institution of, Adjudication in, and Punishment for Criminal Contempt

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

The National Labor Relations Board (herein called the Board), respectfully requests this Court to institute, *sua sponte*, a prosecution of Local Union 825, International Union of Operating Engineers, AFL-CIO, and Peter W. Weber, and each of them, for criminal contempt of this Court, by reason of their having knowingly and wilfully, and with intent to do so, violated, disobeyed, and failed and refused to comply with, the decree of this Court entered on February 11, 1964, in *N.L.R.B.* v. *Local Union 825, International Union of Operating Engineers, AFL-CIO*, No. 14,331, and to adjudge and punish them for such criminal contempt.

In support of its request, the Board upon information and belief, alleges as follows:

1. On February 11, 1964, this Court entered its decree herein enforcing in full an order of the Board issued on January 7, 1963, 140 NLRB 458. In pertinent part, the order of the Board, as enforced by said decree, directs that Local Union 825, International Union of Operating Engineers, AFL-CIO, and its officers, representatives, agents, successors and assigns shall:

> 2. Take the following affirmative action which is necessary to effectuate the policies of the Act:
>
> (a) Post at its business office copies of the notice attached hereto and marked "Appendix A." Copies

of said notice to be furnished by the Regional Director for the Twenty-second Region (Newark, New Jersey), shall, after being duly signed by the Respondent, be posted by it immediately upon receipt thereof and maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(b) Furnish to the Regional Director for the Twenty-second Region signed copies of said notice for posting by the above-named Companies, if willing, in places where notices to employees are customarily posted. Copies of said notice, to be furnished by the Regional Director, shall, after being signed by the Respondent, as indicated, be forthwith returned to the Regional Director for disposition by him.

II. The said decree has been in full force and effect since its entry, and at all times material herein Local Union 825, International Union of Operating Engineers, AFL-CIO, and Peter W. Weber (hereinafter called respondent Union and respondent Weber, respectively, and collectively called respondents) have had full knowledge of its terms.

III. Respondents have knowingly and wilfully, and with intent to do so, violated, disobeyed, and failed and refused to comply with the said decree of this Court in that respondents have failed, and refused, to comply with those portions of the Board's order which require the signing and posting of copies of the notice attached to the said

order and have thereby prevented the effectuation of the policies of the National Labor Relations Act, as amended. More particularly, the Board shows the Court as follows:

1. On February 14, 1964, John J. Cuneo, Regional Director of the Board's Twenty-second Region, by letter addressed and mailed by certified mail to respondent Union, requested said respondent to comply with this Court's decree of February 11, 1964, and included the following request in said letter:

> Kindly advise us how many copies of the notice you will need in order to comply with the Decree and we will send the requisite number to you immediately.

2. On February 18, 1964, Arthur P. West, Compliance Officer for the Board's Twenty-second Region, in a telephonic conversation with Mr. Leo Brock, who represented himself as an agent of respondent Union, asked whether respondent Union would comply with the notice posting provisions of this Court's decree. Mr. Brock replied that respondent Union had referred this question to its attorneys.

3. On February 24, 1964, Compliance Officer West, in a conversation with respondent Weber, respondent Union's Business Manager and Agent, requested compliance with this Court's decree and simultaneously tendered to Weber copies of the said notice for execution by respondent Union. Respondent Weber replied that respondent Union would not sign the notices as required under the Board's order and this Court's decree, and rejected the tender.

4. On February 27, 1964, by telegram, John J. Cuneo, Regional Director of the Board's Twenty-second Region advised respondent Union that failing the receipt of ad-

vice that appropriate action has been taken with regard to the decree before the close of business he would be constrained to recommend that the General Counsel proceed to contempt.

5. Since entry of this Court's decree on February 11, 1964, respondents have neither signed nor posted any of the said notices, and have refused and continued to refuse to sign or post said notices.

IV. In violating, disobeying, and failing and refusing to comply with, the decree of this Court in the manner described in paragraph III and its subparagraphs above, respondents and each of them, did so knowing and wilfully, and with intent to do so, violate, disobey, and fail and refuse to comply with, the aforesaid decree of this Court. Thereby, said respondents, and each of them, has been, and are, in criminal contempt of this Court and its lawful authority.

WHEREFORE, the Board respectfully requests:

1. That the Court institute *sua sponte*, a prosecution of said respondents, and each of them for criminal contempt of this Court.

2. That the Court appoint and designate Marcel Mallet-Prevost, Paul Elkind, and Leonard M. Wagman, attorneys for the Board, as counsel for the Court to prosecute the criminal contempt.

3. That the Court issue an order requiring said respondents, and each of them, to appear before this Court, at a time and place fixed by the Court, and then and there plead, and be prepared to present their defense, if any, to a charge of criminal contempt of this Court by reason of

their having knowingly and wilfully, and with intent to do so, violated, disobeyed, and failed and refused to comply with, the decree of this Court entered on February 11, 1964, in *N.L.R.B.* v. *Local Union 825, International Union of Operating Engineers, AFL-CIO*, No. 14,331.

4. That upon return of said order of notice, respondents, and each of them, be adjudged in criminal contempt of this Court and punished by fine or imprisonment, in such manner as this Court may deem just and proper.

Dated at Washington, D. C., this 27th day of March, 1964.

NATIONAL LABOR RELATIONS BOARD
By MARCEL MALLET-PREVOST
Marcel Mallet-Prevost
Assistant General Counsel

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

PAUL ELKIND,
LEONARD M. WAGMAN,
Attorneys,
National Labor Relations Board
Washington, D. C.

(Verified on March 27, 1964.)

IR-381-62

APPENDIX A

NOTICE

TO ALL OUR MEMBERS AND TO ALL EMPLOYEES OF NICHOLS ELECTRIC COMPANY, SELBY DRILLING COMPANY AND ELMHURST CONTRACTING COMPANY PURSUANT TO THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby give notice that:

WE WILL NOT engage in, or induce or encourage any individual employed by Nichols Electric Company, Selby Drilling Company, Elmhurst Contracting Company, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or refusal in the course of his employment to perform any services, or threaten, coerce, or restrain the above-named Companies and persons, where an object thereof in either case is to force or require Nichols Electric Company to assign the work of operating power-driven drilling and hoisting equipment to employees engaged as operating engineers who are represented by Local Union 825, International Union of Operating Engineers, AFL-CIO, rather than to employees represented by another labor organization, except in-

sofar as any such action is permitted under Section 8(b)(4)(D) of the Act.

LOCAL UNION 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO
(Labor Orangization)

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 614 National Newark Building, 744 Broad St., Newark 2, New Jersey (Tel. No. Market 4-6151), if they have any question concerning this notice or compliance with its provisions.

APPENDIX B

Order of Notice

Upon the verified petition of the National Labor Relations Board requesting this Court to institute, *sua sponte*, a criminal contempt proceeding, and upon all the pleadings and proceedings heretofore had herein, and good cause appearing therefor,

IT IS ORDERED that Local Union 825, International Union of Operating Engineers, AFL-CIO, through an authorized representative thereof, and Peter W. Weber, personally, appear before this Court at Philadelphia on the 4th day of May, 1964, at 10:30 A.M., or as soon thereafter as counsel can be heard, and then and there show cause, if any there be, why they should not be adjudged in, and punished for, criminal contempt of this Court by reason of their having knowingly, wilfully, and intentionally failed and refused to comply with the decree of this Court entered herein on February 11, 1964, all as appears from the said petition of the National Labor Relations Board; and

IT IS FURTHER ORDERED that a copy of this order, together with the said petition of the National Labor Relations Board, be promptly served upon said Local Union 825, International Union of Operating Engineers, AFL-CIO, and Peter W. Weber, individually, by the United States Marshall on or before the 17th day of April, 1964, and that a return of such service be filed with the Clerk of this Court.

Done and ordered at Philadelphia, Pa., this 8th day of April, 1964.

By the Court,
McLAUGHLIN, J.

APPENDIX C

Judgment of Conviction of the United States Court of Appeals for the Third Circuit

Present:

McLaughlin, Staley and Hastie,
Circuit Judges.

This matter having come on before the Court upon an order to show cause why the respondents should not be adjudged in criminal contempt of this Court, and the Court having considered the evidence presented and the arguments of counsel, and having found respondent Local Union 825, International Union of Operating Engineers, AFL-CIO, and respondent Peter W. Weber each guilty of criminal contempt of this Court,

It is Ordered:

1. That respondent Local Union 825, International Union of Operating Engineers, AFL-CIO, be fined in the amount of $15,000.00, said fine to be paid the United States by depositing with the Clerk of this Court on or before July 1, 1964, a certified check for $15,000.00; and that in default of payment of said fine appropriate action shall be instituted by the United States to recover the amount thereof.

2. That respondent Peter W. Weber pay a fine of $5,000.00 on or before July 1, 1964, by depositing the amount thereof with the Clerk of this Court by certified check; and that in default of such payment the respondent Peter W. Weber stand committed.

By the Court.
McLaughlin
Circuit Judge

APPENDIX D

Notice of Motion for New Trial

The defendants and each of them and both of them moves the Court to grant them a new trial for the following reasons:

1. The court erred in denying the defendant's motion for acquittal made at the conclusion of the evidence.
2. The verdict is contrary to the weight of the evidence.
3. The verdict is not supported by substantial evidence.
4. The court erred in admitting heresay testimony related through the witness, Arthur West.
5. The court erred in admitting into evidence, Exhibits 2 through 11.

Dated: June 18, 1964

THOMAS E. DURKIN, JR.
Thomas E. Durkin, Jr.
Attorney for Defendants

Pursuant to Rule 33 of
The Federal Rules of
Criminal Procedure

APPENDIX E

Notice of Motion Pursuant to Rule 23 of the Federal Rules of Criminal Procedure

The defendants move the court pursuant to Rule 23 of the Federal Rules of Criminal Procedure as follows:

1. That the court make a specific finding of facts.

Dated June 18, 1964

THOMAS E. DURKIN, JR.
Thomas E. Durkin, Jr.
Attorney for Defendants

Pursuant to Rule 23 of the Federal Rules of Criminal Procedure

APPENDIX F

Findings of Fact and Conclusions of Law and Order Denying Motion for New Trial of the United States Court of Appeals for the Third Circuit

The National Labor Relations Board having petitioned this court to institute, *sua sponte*, a prosecution of respondents Local Union 825, International Union of Operating Engineers, AFL-CIO, and Peter M. Weber for criminal contempt of this Court by reason of their having knowingly intentionally and wilfully failed and refused to comply with and obey the provisions of the decree of this Court entered on February 11, 1964, which required said Union, its officers, representatives and agents immediately to sign and post certain specified notices to employees and union members and forthwith to furnish signed copies thereof to the Regional Director of the Twenty-Second Region of the National Labor Relations Board for posting on the premises of Nichols Electric Company, Selby Drilling Company, and Elmhurst Contracting Company; respondents having on March 30, 1964 answered said petition to adjudicate respondents in criminal contempt; this Court having on April 8, 1964 ordered respondents to appear before the Court on May 4, 1964, and show cause why they should not be adjudged in criminal contempt; respondents having appeared before this Court on May 4, 1964 and pleaded not guilty to the charge of criminal contempt; the matter having come on for hearing before this Court on June 17, 1964; the said Union and Peter M. Weber having appeared before this Court personally and by counsel, and been afforded full opportunity to offer testimony, evidence and argument; and the Court having considered all the testimony, evidence and argument offered and being fully informed in the premises and respondents, after

having been adjudged guilty of criminal contempt as charged and having been sentenced thereon, having requested specific Findings of Fact, which request has not been withdrawn, makes these

Findings of Fact

1. Respondent Peter M. Weber is, and at all times herein material has been, business manager of respondent Local Union 825, International Union of Operating Engineers, AFL-CIO, and as such is and has been the highest paid elective officer of said Union.

2. Respondent Peter M. Weber is, and at all times herein material has been, the principal managing agent of respondent Local Union 825, International Union of Operating Engineers, AFL-CIO.

3. Respondent Peter M. Weber does exercise, and at all times herein material has, exercised final authority on behalf of said Union with respect to compliance with orders of the National Labor Relations Board and with decrees of this Court enforcing said orders.

4. Since entry of the decree, respondents Local Union 825, International Union of Operating Engineers, AFL-CIO, and Peter M. Weber have had notice and knowledge of the terms of the decree of this Court of February 11, 1964.

5. The notices to employees and union members, required by paragraph 2(a) of said decree to be signed and posted by respondent Union, its officers, representatives and agents immediately upon receipt of copies of the notice from the Regional Director for the Twenty-Second

Region of the National Labor Relations Board, were not posted by respondent Union or any of its, officers, representatives or agents, until April 14, 1964. This was after service upon respondents of the order of this Court of April 8, 1964, requiring respondents to show cause why they should not be adjudicated in criminal contempt. Between the entry of the decree of this Court of February 11, 1964, and the filing of the petition herein for an adjudication in criminal contempt, representatives of the National Labor Relations Board made repeated attempts through respondent Peter W. Weber and other representatives of respondent Union to secure compliance by respondents with said provision of the decree of this Court of February 11, 1964; however, respondent Peter W. Weber intentionally and deliberately failed and refused to obey said provision of the Court's decree.

6. Likewise, the notices to employees and union members, required by paragraph 2(b) of the Court's decree forthwith to be signed by respondent Union, its officers, representatives and agents, and returned to the Regional Director of the Twenty-Second Region of the National Labor Relations Board for posting on the premises of Nichols Electric Company, Selby Drilling Company and Elmhurst Contracting Company, were not signed by respondent Union or its officers, representatives or agents, and returned to said Regional Director until April 14, 1964. Between the entry of this Court's decree of February 11, 1964, and the filing of the petition herein for an adjudication of criminal contempt, representatives of the National Labor Relations Board tried repeatedly to induce respondents Peter W. Weber and other representatives of respondent Local Union 825, International Union of Operating Engineers, AFL-CIO, to comply with said provision of the

decree of February 11, 1964; however, respondent Peter W. Weber deliberately and intentionally failed and refused to obey said provision of the Court's decree.

CONCLUSIONS OF LAW

1. Respondent Peter W. Weber is and at all times herein material has been an officer, representative and agent of respondent Local Union 825, International Union of Operating Engineers, AFL-CIO, within the meaning of the decree of this Court of February 11, 1964.

2. By deliberately, intentionally and wilfully refusing to post the said notices to employees and union members until April 14, 1964, respondents Peter W. Weber and Local Union 825, International Union of Operating Engineers, AFL-CIO, have wilfully and intentionally violated paragraph 2(a) of this Court's decree of February 11, 1964.

3. By deliberately, intentionally and wilfully refusing to furnish the Regional Director of the Twenty-Second Region of the National Labor Relations Board with signed copies of notices for posting on the premises of the Nichols Electric Company, Selby Drilling Company and Elmhurst Contracting Company until April 14, 1964, respondents Peter W. Weber and Local Union 825, International Union of Operating Engineers, AFL-CIO, have wilfully and intentionally violated paragraph 2(b) of this Court's decree of February 11, 1964.

The motion for a new trial made after the sentencing of respondents and which has not been withdrawn, is denied.

GERALD MCLAUGHLIN

AUSTIN L. STALEY

WILLIAM H. HASTIE
Circuit Judges

Dated: July 16, 1964

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 488

IN THE MATTER OF LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS AND PETER W. WEBER, PETITIONERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD[1]

OPINIONS BELOW

The judgment of conviction and sentence imposed by the court of appeals is printed at page 19 of the petition. The court's findings of fact, conclusions of law, and order are printed at pages 22–25 of the petition.

JURISDICTION

The judgment of conviction was entered on June 17, 1964, and a timely petition for a new trial was denied on July 16, 1964 (Pet. 2, 25). On August 12, 1964,

[1] The Board initiated the present proceeding, requesting the court below to institute criminal contempt proceedings against petitioners, and the Board's attorneys prosecuted the case on behalf of the court.

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the Chief Justice extended the time for filing a petition for a writ of certiorari to and including September 14, 1964. The petition was filed on September 11, 1964. This Court has jurisdiction under 28 U.S.C. 1254(1).[2]

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction to try and convict petitioners for criminal contempt upon their refusal to comply with the court's decree enforcing an order of the National Labor Relations Board.

2. Whether the action of the court of appeals deprived petitioners of a constitutional right to appeal their conviction.

3. Whether petitioner Weber was properly included as a party defendant in the contempt proceeding.

4. Whether petitioners were entitled to a trial by jury.

STATUTE INVOLVED

Section 401 of Title 18 of the United States Code reads in pertinent part:

> A court of the United States shall have power to punish by fine or imprisonment * * *. (3) Disobedience or resistance to its lawful writ * * *.

STATEMENT

On January 8, 1964, the court below sustained the National Labor Relations Board's finding that petitioner, Local 825, International Union of Operating

[2] Presumably by inadvertence, the petition (p. 2) invokes Section 1254(2), which is plainly inapplicable.

Engineers, had violated Section 8(b)(4)(D) of the National Labor Relations Act. The violation consisted of exerting secondary pressure against Nichols Electric Company, an electrical subcontractor, to force Nichols to assign certain work to operating engineers, represented by Local 825, rather than to electricians represented by the International Brotherhood of Electrical Workers, despite the fact that the Board had previously determined that Local 825 was not entitled to this work. On February 11, 1964, the court entered its decree enforcing the Board's order (Pet. 22). *National Labor Relations Board* v. *Local 825, International Union of Operating Engineers, AFL–CIO*, 326 F. 2d 213 (C.A. 3), enforcing, 140 NLRB 458. The order directed "Local Union 825, International Union of Operating Engineers * * * and its officers, agents, representatives * * *," *inter alia*, to post "at its business office," and to furnish to the Board's Regional Director, signed copies of a notice stating that "We will not engage in, or induce or encourage any individual employed by Nichols Electric Company, Selby Drilling Company, Elmhurst Contracting Company *** * to engage in, a strike or refusal * * * to perform * * * services * * * where an object thereof in either case is to force or require Nichols Electric Company to assign the work of operating power-driven drilling and hoisting equipment to employees engaged as operating engineers who are represented by Local Union 825 * * * rather than to employees represented by another labor organization * * *" (Pet. 16).

After the entry of the court's decree, representatives of the Board's Regional Office made repeated efforts, through petitioner Weber[1] and other representatives of Local 825, to obtain compliance with the provisions of the Board's order requiring the posting of the notice, but the Union and its representatives refused to comply (Pet. 24–25).[2] On March 27, 1964, the Board petitioned the court of appeals to institute criminal contempt proceedings against Local 825 and Weber for wilfully disobeying and refusing to com-

[1] Petitioner Weber is the business manager of Local 825 (Pet. 2).

[2] The transcript of the testimony adduced before the court below has been filed with the petition. It reveals the following with respect to the efforts to obtain compliance:

After the entry of the court's decree, Board Compliance Officer Arthur West repeatedly attempted, without success, to reach Weber by letter and by telephone to determine whether the Union intended to comply with the decree (Tr. 24, 27, 40, 42, 43). On February 24, West discovered that Weber, his executive aide, and Union attorney Durkin had come to the Board's Newark Regional Office (where West worked) on another matter (Tr. 44). Finding them there, West asked whether the Union would post and sign the notices. At first, Durkin stated that it would, and West therefore went to get the notices for signature. When he returned, Weber told West that the notice was "too broad," that it "could not" be posted, and that, "I will not sign those notices" (Tr. 46). West cautioned Durkin that the Board would institute contempt proceedings if the Union remained obdurate (Tr. 47). When Durkin failed to respond to still another telephone call on February 27, West prepared a telegram for the Regional Director's signature, informing the Union and its attorneys that, unless they notified the Regional Director by the close of business on that day that the Union had posted and signed the notices, the Regional Director would recommend that the General Counsel "proceed to contempt" (Tr. 5). The telegram was sent, but the Union did not comply.

ply with the court's decree. The petition further requested that the court appoint Board attorneys as counsel for the court to prosecute the criminal contempt (Pet. 11–15). On April 8, 1964, the court issued an order to show cause, directing both Local 825 and Weber to appear before it on May 4, 1964 (Pet. 18).[5]

On June 18, after a hearing at which both testimony and documentary evidence were presented, the court adjudged Local 825 and Weber guilty of criminal contempt, and fined the former $15,000 and the latter $5,000 (Pet. 19). Petitioners filed a motion for new trial, and a motion for findings of fact—neither of which raised any of the questions sought to be presented in the present petition for certiorari (Pet. 20, 21). The court entered findings of fact, but denied the motion for a new trial (Pet. 22–25).[6]

DISCUSSION

Petitioners have asked this Court to decide four questions: 1) whether the courts of appeals have jurisdiction to try criminal contempts; 2) whether trial before an appellate court deprived petitioners of a constitutional right to appeal their convictions; 3) whether petitioner Weber was properly made a party defendant; and 4) whether petitioners were

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[5] After service of the show cause order, the Union posted the notices (Pet. 24).

[6] In its findings, the court found, *inter alia*, that both Local 825 and Weber, its principal managing agent, had "deliberately, intentionally and wilfully" refused, until April 14, 1964, to post the notices required by the Board's order and the court's decree (Pet. 25).

constitutionally entitled to a jury trial. We show below that the first three questions are wholly insubstantial, but we do not oppose certiorari to resolve the fourth question.

1. The courts of appeals clearly have jurisdiction to try criminal contempts. Section 401 of the Criminal Code (*supra*, p. 2) provides that "A court of the United States shall have power to punish by fine or imprisonment * * * (3) Disobedience or resistance to its lawful writ." The courts of appeals have repeatedly exercised that power without questioning its existence. *E.g., Tornanses* v. *Melsing*, 106 Fed. 775, 790 (C.A. 9), petition for habeas corpus denied, *sub nom. In re Alexander McKenzie*, 180 U.S. 536; *In re Whitney & Co.*, 273 F. 2d 211 (C.A. 9); *In re Door*, 195 F. 2d 766 (C.A. D.C.); *National Labor Relations Board* v. *Star Metal Mfg. Co.*, 187 F. 2d 856 (C.A. 3); *National Labor Relations Board* v. *Essex County News Co.*, 28 LRRM 2634 (C.A. 3); *In re Seafarers' International Union, No. 5506* (C.A. 1, decided June 15, 1963) (unreported); *National Labor Relations Board* v. *Conover Motor Co.* (C.A. 10), 8 Court Decisions Relating to the National Labor Relations Act 945 (C.P.O., 1955). So has this Court. *United States* v. *Shipp*, 203 U.S. 563. See, also, *Merrimack Riv. Sav. Bank* v. *Clay Center*, 219 U.S. 527.

We have found no decisions suggesting that appellate courts lack the contempt power. The question not passed upon in *United States* v. *Barnett*, 376 U.S. 681, to which petitioners refer (Pet. 5), was whether "the Court of Appeals had * * * jurisdiction

in the matter *since its mandate had been issued and the case had been remanded to the District Court"* when the alleged contempt **occurred** (p. 689, emphasis supplied).

2. The Constitution does not compel either the States or the federal government to provide appellate review of criminal proceedings. *Griffin* v. *Illinois*, 351 U.S. 12, 18; *McKane* v. *Durston*, 153 U.S. 684, 687–688. Cf. *Bessette* v. *W. B. Conkey Co.*, 194 U.S. 324, 331–336; *New Orleans* v. *The Steamship Co.*, 20 Wall. 387, 392. Indeed, "no appeals from convictions in the federal courts were afforded (with roundabout exceptions negligible for present purposes) for nearly a hundred years; and, despite the civilized standards of criminal justice in modern England, there was no appeal from convictions (again with exceptions not now pertinent) until 1907." *Griffin* v. *Illinois*, *supra*, at 21 (Frankfurter, J., concurring). The "judicial language" petitioners cite in *Brown* v. *Looney*, 249 F. 2d 61 (C.A. 10), and *Rayne* v. *Warden*, 198 F. Supp. 552 (D. Md.) (Pet. 5), does not reflect the view that due process requires an appellate proceeding in criminal cases. The contexts of those statements demonstrate that both courts were applying the well established constitutional principle that, where an appellate proceeding *is* provided, the government must not unlawfully obstruct access to it. See authorities cited in *Brown* v. *Looney*, *supra*, 249 F. 2d 62, n. 2.

3. Petitioner Weber was properly cited as a defendant in the contempt proceeding. The Board's

order was directed to "Local Union 825 * * * and its officers, agents, representatives." 140 NLRB 458, 465. Petitioner Weber does not dispute the finding of the court below that he is the Local's business manager and its highest paid elective officer (Pet. 23). He admitted that he was the "operative head of Local 825" (Tr. 134), and the court below found that he exercises "final authority on behalf of said Union with respect to compliance with orders of the National Labor Relations Board and with decrees of this Court enforcing said orders" (Pet. 23). These facts support the court's conclusion that petitioner "is and at all times herein materiai has been an officer, representative and agent of respondent Local Union * * *." Weber was therefore a proper defendant. See *Regal Knitwear Co.* v. *National Labor Relations Board,* 324 U.S. 9, 14; 7 Moore, *Federal Practice,* par. 65.13, p. 1672 (1955), citing, *inter alia, Le Tourneau Co.* v. *National Labor Relations Board,* 150 F. 2d 1012 (C.A. 5).

4. For the reasons set forth in the majority opinion in *United States* v. *Barnett,* 376 U.S. 681, 692–700, we believe that petitioners were not constitutionally entitled to a jury trial on the charges of criminal contempt. But we recognize that the penalty imposed may not satisfy the dictum in *Barnett* to the effect that "Some members of the Court are of the view that * * * punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses" (*Id.,* at 694–695, n. 12). See *District of Columbia* v. *Clawans,* 300 U.S. 617. Accordingly, we

do not oppose certiorari to resolve the question whether petitioners were entitled to trial by jury in light of the penalty imposed, or are now entitled to a diminution of sentence in light of the fact that they were not tried by a jury.[*]

CONCLUSION

For the foregoing reasons, we submit that the petition for certiorari should be denied, except with respect to the fourth question presented.

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NOVEMBER 1964.

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[*] We do not tax petitioners with failing to demand trial by jury in the court below since, under this Court's decision in *Barnett*, they had no constitutional or statutory right to jury trial. It might be argued, however, that, after sentence (some ten weeks after *Barnett* was decided here), petitioners should have raised the point below and that their failure to do so precludes them here. But, since the legality of a sentence is always open to challenge (see Rule 35, F.R.Cr.P.) and no useful purpose would be served by requiring the court below to construe this Court's *dictum* in *Barnett*, we do not urge remand to the court of appeals.